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OFFICE OF PETITIONS

In re Application of
Olin Calvin et al
Application No. 09/923,562
Filed: August 9, 2001
Attorney Docket No. VTN-0551

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ON PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed September 20, 2004, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137(a)."

The above-identified application became abandoned for failure to reply in a timely manner to the non-final Office action mailed December 15, 2003, which set a shortened statutory period for reply of one (1) month. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the above-identified application became abandoned on January 16, 2004.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by: (1) the required reply (unless previously filed), which may be met by the filing of a continuing application in a nonprovisional application abandoned for failure to prosecute, but must be the payment of the issue fee or any outstanding balance thereof in an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof; (2) the petition fee required by 37 CFR 1.17(l); (3) an adequate showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) a terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) for an application filed prior to June 8, 1995. This petition lacks item (3).

The showing of record is inadequate to establish unavoidable delay within the meaning of 35 U.S.C. § 133 and 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the

outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, facsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

As to item (3), petitioner asserts that the delay was caused by nonreceipt of the non-final Office action dated December 15, 2003. A review of the written record indicates no irregularity in the mailing of the Office action, and in the absence of any irregularity there is a strong presumption that the Office action was properly mailed to the applicant at the address of record. This presumption may be overcome by a showing that the Office action was not in fact received. In this regard, the showing required to establish the failure to receive the Office action must consist of a statement from petitioner stating that the Office action was not received and attesting to the fact that a search of the file jacket and docket records was conducted. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. If petitioner does not maintain a record of receipt of papers from the Office, then petitioner must explain the procedures and controls utilized for the handling of his most important correspondence or Office action upon receipt.

If petitioner cannot provide evidence of the nature required above or simply does not wish to, petitioner may wish to consider filing a petition under the unintentional provisions of 37 CFR 1.137(b). Public Law 97-247, which revised patent and trademark fees, provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable." See 37 CFR 1.137(b) in effect as of December 1, 1997. *Note Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. 53131 (October 10, 1997), 1203 Off. Gaz. Patent Office 63 (October 21, 1997). An "unintentional" petition must be accompanied by the \$1,370.00 petition fee.

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement of unintentional delay is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

Further correspondence with respect to this matter should be addressed as follows:

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Telephone inquiries concerning this decision should be directed to Wan Laymon at (571) 272-3220.



Frances Hicks

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